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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

REVEREND PAUL SCHENCK and DWIGHT SAUNDERS,
Petitioners,
v.
PRO-CHOICE NETWORK OF WESTERN NEW YORK, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

INTEREST OF THE AMICUS CURIAE

This brief *amicus curiae* for the American Federation of Labor and Congress of Industrial Organizations, a federation of 75 national and international unions representing approximately 13,000,000 working men and women, is filed with the consent of the parties as provided for in the Rules of this Court.

Historically, the AFL-CIO, and its affiliated unions, have had a vital interest in the First Amendment rights of citizens to disseminate their views on the public streets by picketing, handbilling and other communicative means. Indeed, many of the leading cases that this Court has decided in the First Amendment area have involved the efforts of union members to engage in such expressive activities.[1] That being so, the AFL-CIO has filed briefs as an *amicus curiae* in a substantial number of this Court's recent cases involving the exercise of First Amendment rights on the streets.[2]

The AFL-CIO and its affiliated unions have also, over the years, had a vital interest in the scope of the courts' power to enjoin expressive activities in the public demonstration context. The labor movement knows at first hand

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[1] *See, e.g., Hague v. CIO*, 307 U.S. 496 (1939); *Schneider v. State*, 308 U.S. 147, 155 (1939); *Thornhill v. Alabama*, 310 U.S. 80 (1940); *Thomas v. Collins*, 323 U.S. 516 (1945); *NLRB v. Fruit Packers*, 377 U.S. 58 (1964); *DeBartolo v. Florida Gulf Coast Trades Council*, 485 U.S. 568 (1988).

[2] *See, e.g., International Society for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992); *United States v. Kokinda*, 497 U.S. 720 (1990); *Frisby v. Schultz*, 487 U.S. 474 (1988); *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987); *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981).

that this power can be used overbroadly. *See* Frankfurter & Greene, *The Labor Injunction* (1930). Indeed, recognition of that danger led Congress to pass the Norris-LaGuradia Act, 29 U.S.C. § 101, *et seq.*, which protects against such abuses in federal court proceedings.

Because of its interest both in the substantive First Amendment protection for communication on the public streets and in the scope and nature of speech-limiting injunctions, the AFL-CIO filed a Brief Amicus Curiae in Support of Neither Party in *Madsen v. Women's Health Center*, —— U.S. ——, 114 S. Ct. 2527 (1994), and is filing a Brief Amicus Curiae in Support of Neither Party in this case as well.

SUMMARY OF ARGUMENT

I. In *Madsen v. Women's Health Center*, —— U.S. ——, 114 S. Ct. 2516, 2529 (1994), this Court held that to be constitutional speech-limiting injunctions must "burden no more speech than necessary to serve a significant government interest." Applying this constitutional standard, the *Madsen* Court held that where there was a history of access-blocking demonstrations outside a clinic where abortions were performed, an injunction could limit "focused picketing" demonstrations near the entrance to the clinic to an area thirty-six feet from clinic property and ten to twelve feet from the cars entering the clinic's parking lot.

The injunction issued in this case in an attempt to prevent interference with abortion clinic access that is both broader and narrower than the one in *Madsen*. Evaluating its constitutional validity is complicated by several factors, among them that the primary legal basis for the injunction was reversed by the district court some time after the injunction issued; the injunction is a generic one applicable throughout the Western District of New York, not adapted as was the *Madsen* injunction to the configuration of the particular clinic; and the courts below did not

explain why the injunction as issued forbids all forms of communication including leafletting and similar orderly, expressive conduct within its "buffer zone" when the articulated concern is with "in your face" tactics that involve crowding, yelling at, and the following of, individuals entering and leaving the clinic. The explanations for these lapses are that the district court issued its injunction before *Madsen* was decided and applied a looser "time, place and manner," standard and that in reviewing that injunction a majority of the *en banc* Second Circuit, joining an opinion by Judge Winter, proceeded on the basis that *all* at-the-site communicative appeals asking those planning to use a site facility to forego, on a principled basis, their intended course of action is speech entitled to only the most limited First Amendment protection.

II. There is no doubt that an underlying concern of the Winter majority—controlling the abusive confrontations practiced by the defendants in this case as "sidewalk counselling"—*could* be constitutionally accomplished by a carefully drafted injunction. But the broader proposition embraced by that opinion—that the First Amendment does not protect or protects only to a very limited extent *all* at-the-site persuasive activity—has been rejected by this Court in the past and should be rejected again.

This Court held long ago, and has repeated many times since, that the public streets are an area in which governmental authority to restrict speech is at its nadir. Communication on the streets is protected when it persuades to action as well as when it simply provides information or abstract thoughts. And, persuasive speech at the site at which a responsive action is requested, rather than on a remote unconnected street corner, is constitutionally protected as well.

First, the general First Amendment commitment to speaker autonomy includes the speaker's right to select

her own audience, rather than to address a governmentally-defined audience that is much broader than the group of people likely to be interested in the communication or to respond to its persuasive appeal.

Second, the First Amendment protects speech that appeals to emotion as well as to reason, including emotions such as shame and social ostracism, and does not police the response time available to addressees where the requested response is a lawful one.

Third, the First Amendment applies where the addressee is on the street in order to reach some specific location for an important purpose as well as where the addressee is furthering an aimless or idle pursuit. Such individuals are not a "captive audience" in the very limited sense used in this Court's cases—they are neither necessarily exposed for a prolonged period to a communication nor are they entitled to the protection from all unwanted speech accorded in the unique situation of one's own home. Indeed, recognition of a right to be free on public streets from appeals to community responsibility over private preference, would be to take sides on the merits of the moral issue the speaker raises an anathema under the First Amendment and in the free society that Amendment safeguards.

ARGUMENT

I

This case is closely related factually to *Madsen v. Women's Health Center*, —— U.S. ——, 114 S. Ct. 2516 (1994) and the injunction here raises constitutional issues equally closely related.

(A) *Madsen* sets out the standard for determining the validity of injunctive "buffer zone" restrictions on speech activity in the form of a demonstration. *Madsen* is thus in the line of this Court's cases setting the constitutional parameters on the courts' authority to meet *illegal action* —such as obstruction of access to buildings, vandalism or assault—by those engaged in otherwise constitutionally protected speech activity on the public streets, through injunctions that ban *both* the illegal action *and* the defendant's speech activity.[3]

Injunctions against a defendant's speech activity predicated on the trial court's judgment as to what is necessary to provide complete relief to a plaintiff with good legal claims against the defendant, as *Madsen* recognizes, not only run against the First Amendment's grain but do so through a process that carries a greater potential for point-of-view based/content-based discrimination than an across-the-board legislative limitation on a defined class of speech activity on the public streets.[4] That being so,

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[3] The generic problem addressed in these cases long antedates the recent abortion controversy. The labor movement, the civil rights movement, and the student and antiwar movements have all pressed strongly-held viewpoints through a combination of fully-protected speech activity and street actions that obstruct, illegally intrude on, or even physically endanger others. *See, e.g., Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287 (1940); *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175 (1968); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982); *cf. Cox v. Louisiana*, 379 U.S. 536 (1965).

[4] While the reasons spelled out in the *Madsen* opinion provide a more than sufficient base for the Court's holding, they are not

the *Madsen* Court concluded that to pass constitutional muster speech-limiting injunctions must "burden no more speech than necessary to serve a significant government interest," or, in an alternative synonymous formulation, must be " 'couched in the *narrowest terms that will accomplish the pin-pointed objective*' of the injunction." 114 S. Ct. at 2525, 2526 (*quoting Carroll v. President and Comm'rs of Princess Anne, supra*, 393 U.S. at 183) (emphasis added)).

The *Madsen* standard, then, both recognizes that a range of governmental non-speech interests can justify a speech-limiting injunction and *closely polices* that justification to assure that the speech limitation is in all its aspects in truth *necessary* to protect that governmental interest. And, *Madsen* shows that this developing standard is not merely formulaic, but requires a detailed judicial consideration of whether *each* speech limitation included in an injunction is narrowly tailored both with regard to the kinds of speech activity restricted and with regard to the size and location of the restricted area.

Thus, the *Madsen* Court exhaustively considered not only each separate provision of the injunction, but also, in painstaking detail, "each portion of [its] buffer zone[s]". 114 S. Ct. at 2527. In so doing, the Court *struck down* all aspects of the injunction in question that created prophylactic no-speech "buffer zones" with one exception —the injunction providing for a limitation on demonstra-

exhaustive. Other considerations also support the conclusion that injunctions limiting speech often carry more First Amendment dangers than generally-applicable ordinances controlling speech in public places, including: the availability of enforcement of the injunction through civil contempt proceedings, without the safeguards available in criminal trials; the fact that both the decision to seek injunctive relief and the decision to charge contempts are often in the hands of individuals with strongly held ideological views or practical interests directly opposed to those of the defendants, rather than in the hands of neutral prosecutors; and the limitations on the defendant's right to challenge an injunction on constitutional grounds if charged with a violation of its terms.

tions "within 36 feet of the property line of the clinic" on the *one side* of the clinic nearest its entrance and its parking lot, "as a way of ensuring access to the clinic." 114 S. Ct. at 2526.

That aspect of the injunction was upheld: (1) in recognition that the demonstrators would be "at a distance no greater than *10 to twelve feet*" from their principal target, "the cars [entering] the parking lot" (114 S. Ct. at 2527 (emphasis supplied)); (2) on the understanding that the injunction was for the purpose of protecting clinic access and for no other purpose (*id.*); (3) on the further understanding that the injunction banned the kind of "focused picketing" the Court had long distinguished from handbilling and solicitation which, in contrast, "cannot be completely banned in public places" (*id.*); and (4) because an earlier injunction, proscribing only non-speech activity, "did not succeed in protecting access to the clinic" (*id.*).[5] At the same time, *Madsen* disapproved the thirty-six foot buffer zone insofar as it applied to the non-entrance sides of the clinic, as not "necessary to protect access to the clinic." *Id.*

[5] The courts below were of the view that the failure of a first injunction restricting only illegal acts is not essential to the validity of a "buffer zone" restriction. We believe *Madsen*'s discussion of this point and its repeated invocation of *Milk Wagon Drivers v. Meadowmoor Dairies, supra*, is sufficient to show the opposite. 114 S. Ct. at 2527, 2529. Absent a record of pervasive violence or obstruction which justifies an injunction removing the demonstrators from the scene for a time so as to diffuse conflict and to remove any implicit threat of violence, enjoining speech rather than conduct in the first instance, among other vices, makes it all but impossible later to determine the *necessity* for a speech-limiting injunction, and as a general matter should not be permitted.

We recognize that here the defendants essentially stipulated to the continuation of the original temporary restraining order, premised on a complaint alleging pervasive obstruction through human blockades for many months. In such a situation it may well be that the defendants should not be heard now to complain that the record was not sufficient to justify the original speech limitations.

(B) The injunctive provision here is both broader and narrower than the one approved in *Madsen*. In the first regard, the injunction is not limited to demonstration activity nor are its prohibitions tailored to a particular location near a particular clinic at which defendant wrongdoing had occurred in the past. Rather, the injunction reaches beyond demonstrations to "handbilling and soliciting"; applies generically to all locations at which abortions are performed in the Western District of New York; and creates a "bubble buffer zone" (of fifteen feet from any individual or car entering or leaving the clinic, or from any entrance or exit or parking lot or driveway) that is in actual practice considerably broader in some respects than the "buffer zone" approved in *Madsen*, principally because of its "floating" nature. In the last regard, the reflexive tape measure reaction of the courts below—that this 15-foot "buffer zone" is less restrictive of speech than the one in *Madsen* which reached thirty-six feet from the clinic entrances and exits there—is simply wrong. Rather, the "buffer zone" here places speakers *further* from their addressees in entering cars than the one in *Madsen*, and applies to addressees on foot and in cars considerably more than fifteen feet from the entrances and exits to the clinics.

That the "buffer zones" differ in this respect does not, of course, answer the question whether the injunction in this case is valid, any more than the conclusion that the "buffer zone" here is narrower would do so. Rather, the very point of *Madsen*, ignored not only by the opinions below in this case but in other opinions applying *Madsen*, is that injunctions are *not* statutes applicable to all speakers in an undifferentiated manner, but are justifiable, if at all, by *particular* speaker conduct and by particular circumstances.[6]

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[6] *Compare, e.g., Planned Parenthood Shasta-Diablo, Inc. v. Williams*, 10 Cal. 4th 1010, 1021 (1995) (approving sixty-foot no-speech "buffer zone" allowing demonstrations only across a busy four-lane road from the clinic because a thirty-six foot zone was allowed in *Madsen* and the difference "is a relatively small difference in degree"); *id.* at 1033 (Kennard, J., dissenting) (the "buffer zone" was not valid because of the greater difficulty, as compared to *Madsen*, of communicating a message to patients and employees driving and walking to the clinic, and because a prior more limited injunction which allowed some communication in the zone had, on the record, succeeded in protecting access.)

At the same time, the injunction here was issued against individual defendants with a long and documented history of physically blockading clinics in the covered area.[7] And, the injunction does not have the feature faulted by the *Madsen* Court in striking down aspects of the 36-foot buffer zone there. This injunction covers only clinic entrances and exits and individuals entering or leaving, not areas near the clinics but not implicated by access-limiting activity. While it may be that these circumstances would justify the injunction, the lower courts have left their justification theory entirely opaque. Three factors explain this discontinuity.

First, the procedural posture of this case is such that it is not possible to identify with any precision the legal wrongs the injunction is intended to remedy. The district court, at the time the preliminary injunction was issued, determined that the plaintiffs had shown a likelihood of success on the merits as to three of their causes of action —a federal cause of action for violation of 42 U.S.C. § 1985(3), a state cause of action for violation of N.Y. Civ. Rights Law § 40-c (prohibiting discrimination or harassment on the basis of sex in the exercise of civil rights), and a state cause of action for trespass. 799 F. Supp. 1417, 1432 (1992). Subsequently, however, the district court determined that under this Court's decision in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), the § 1985(3) cause of action had to be dismissed.

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[7] In form, moreover, the injunction allowed for *some* speech activity within the "buffer zone," although in such circumscribed terms as to negate that allowance. *See* pp. 14-15 & n.12, *infra*.

828 F. Supp. 1018, 1020 (1993).[8] On appeal, defendants argued that the remaining two causes of action could not support the injunction, since the state civil rights provision does not authorize injunctive relief and the trespass cause of action is too narrow to justify relief having nothing to do with trespass. 67 F.3d 359, 367 (1994). The Second Circuit panel, however, declined to rule "whether the injunction exceeds its state law basis and whether, if so, other state law and federal law bases exist for this injunction" because that issue was not properly raised. 67 F.3d at 368.

Under general equity principles, "an injunction issues only if there is a showing that the defendant has violated, or imminently will violate, some provision of statutory or common law," and to prevent recurrences of those violations. *Madsen*, 114 S. Ct. at 2524 n.3. And, *Madsen* adds a requirement that any speech-limiting injunction provision be *necessary* to remedy a law violation. Thus, while the court below's decision not to rule on a question not properly raised cannot be faulted in its own terms, that decision means that its *Madsen* inquiry rests on an uncertain base. For the likelihood of success with respect to any state cause of action sufficient to support the injunction is a matter left in abeyance.

The district court, it is true, determined that the injunction is justified on the basis of several significant state interests, including the "governmental interest of ensuring that abortions are performed safely" (799 F. Supp. at 1433), "public safety" (*id.*) and protection of the constitutional right to obtain an abortion (*id.*). But injunctive relief must be justified not by significant governmental interests in the abstract, but by those significant governmental interests that are expressed in a legal norm that has been violated.

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[8] Although plaintiffs were accorded leave to amend the complaint with respect to the § 1985(3) cause of action, they have not yet done so as far as we can ascertain.

In the absence of clarity about the statutory or common law violation underlying the injunction—for example, whether that law relates only to protection of private property, as does trespass law, or relates to the protection of medical privacy or of constitutional rights—it is difficult to determine whether each speech-limiting aspect of the injunction is or is not truly necessary to provide relief for that violation.[9]

Second, the injunction here is a generic one, applicable to locations known and unknown in western New York at which abortions are performed. As a consequence, the injunction is not—and could not—be tailored to the geographic layout of any particular location, as was the *Madsen* injunction. In particular, while the fifteen foot limitation was explained by the district court as necessary safely to allow for cars turning into parking lots or driveways (Sept. 27, 1990 Tr. 36), at least some of the clinics in the Western District are presumably approachable from public property on foot as well as by car. And, *Madsen*'s "necessity" standard at the very least would appear to require differentiating such areas, providing for one limitation at those entrances where individuals are approaching in cars and lesser limitations more amenable to normal spoken communication and handbilling at entrances where individuals are approaching on foot.[10]

Third, and of equal importance, the lower courts have not in terms of the *Madsen* standard explained why it is "necessary" to limit forms of communicative activity other

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[9] The importance of relating the substance of speech-limiting injunctions to actual causes of action, as opposed to justifications for speech restrictions based on *ad hoc* judicial determinations of interests and equities, is demonstrated by the abuses that developed during the heyday of the now discredited government by labor injunction regime when that principle was ignored. *See* Frankfurter & Greene, *The Labor Injunction* (1930).

[10] This point could also be accommodated to some degree by altering the "floating" aspect of injunctions like the one here so as to apply differentially to cars and to pedestrians.

than "sidewalk counselling" within the fifteen-foot floating "bubble buffer zone." The felt need to end harassing and intimidating "counselling" techniques absent some explanation otherwise, can, of course, be implemented by allowing *e.g.*, orderly handbilling and sign carrying within the fifteen-foot area, while forbidding grabbing, touching, pushing, shoving, or crowding (799 F. Supp. at 1440), as well as the unwanted following of individuals entering and leaving the clinic. By going further, the "buffer zone" provision effectively forbids non-abusive forms of direct communication and does so without explanation.[11]

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[11] It is quite possible that the reason that orderly handbillers, sign-holders and other such speakers were not accommodated by the district court is that the defendants had no interest in such speech activity and did not ask for such an accommodation. And, unlike statutes, injunctions appropriately are limited to the individuals actually before the court, and are shaped by their litigative strategies and decisions. Our point, then, is not that this injunction must necessarily be modified to accommodate orderly forms of speech not now permitted and not practiced by the actual defendants, but that this Court take care not to sanction, as presumptively valid, injunctions reaching such benign means of expression.

We note that even if there are circumstances involving prior violence, obstruction or tortious harassment in which an injunction barring all communicative activity that brings the speakers within fifteen feet of the addressee could be valid, it is almost certain that a generally-applicable statute so providing would not be. For the inability to engage in such traditional communicative activity would, for reasons developed in Part II, *infra*, substantially burden free speech rights of a substantial number of individuals who have *not* engaged in any wrongdoing. Absent some particularized basis for believing that *all* the individuals affected will engage in wrongdoing, a "time, place or manner" restriction of this kind would therefore be overbroad on its face. This comparison illustrates, then, that despite the lesser standard of scrutiny recognized in *Madsen* for legislation, the tailored nature of injunctions means that speech restrictions can be valid in injunctions when identical restrictions would be invalid if applied across-the-board. *See Howard Gault Co. v. Texas Rural Legal Aid*, 848 F.2d 544 (5th Cir. 1988) (holding statute providing for across-the-board limitations on peaceful picketing invalid); *United Food & Commercial Workers Intern. Union v. IBP, Inc.*, 857 F.2d 422 (8th Cir. 1988) (same).

The foregoing is not to say that the injunction as issued (or as slightly modified in the ways suggested above) can not be retroactively justified on the *Madsen* standard on the basis of the voluminous record in this case made in the district court after the close scrutiny mandated by *Madsen*. Our point, rather, is that neither lower court has provided that scrutiny or undertaken the justification task that *Madsen* lays out. In the case of the district court, the failure of explanation is almost certainly due to the fact that the injunction issued before *Madsen* and that the trial court followed the then-standard—and looser—"time, place and manner" standard. In the case of the en banc Second Circuit, the lapses just discussed as surely reflect the view of ten of the fifteen judges on that court that at-the-site appeals to "targeted audiences," in whatever form, are not entitled to the full protection of the First Amendment. 67 F.3d at 394 (opinion of Winter, J., for ten judges (hereafter "Winter opinion" or "Winter majority")). As we now show, that is *not* a proper understanding of the First Amendment's reach.

II

The Winter majority rests its opinion squarely on the proposition that this case concerns a class of speech activity on the public streets that can be enjoined without the kind of record of repeated unlawful conduct involved in *Madsen*, and without regard to *Madsen's* stringent "narrowest terms" test. *See* 67 F.3d at 396 ("an extensive record of coercion or obstruction is not necessary to justify an injunction requiring physical separation[;] isolated threats or obstructions" are sufficient.)

According to the Winter majority, this disfavored class covers speech activity on the public streets—including efforts by a speaker to talk to, or to handbill, an addressee—"targeted at specific individuals . . . at locations difficult or inconvenient for them to avoid", including

addressees who are "customers of a business, residents of a particular house, workers at a firm, the trustees of a university, military recruiters, delegates at a political convention, or patients and employees of an abortion clinic." 67 F.3d at 396.

This is a curious classification, to say the least, since *Madsen* itself involved at-the-site appeals to a "targeted" audience attempting to influence the actions of members of that audience at that site, just as this case does. And *Madsen* specifically holds that in this context, as well as others, the First Amendment requires that " 'our citizens must tolerate insulting, and even outrageous, speech' " (114 S. Ct. at 2529, *quoting Boos v. Barry*, 485 U.S. 312, 322 (1988)), and invalidates blanket injunctive prohibitions on orderly forms of face-to-face communication. *Id.*[12]

The Winter opinion's classification is curious as well because the underlying concern expressed several times—that face-to-face communication concerning contentious issues can lead to unprotected conduct such as pursuing unwilling addressees, crowding addressees at less than arm's length, screaming at addressees at decibel levels above the tolerable—could have been met separately by enjoining such harassing conduct through a set of carefully drafted provisions that do not at the same time sweep in handbillers and peaceful sign carriers and quiet if persistent oral appeals from a civil distance.[13] The established First Amendment law does permit limitations on communicative behavior that turns into harassment through incessant repetition, intolerable noise levels, or physical crowding at closer than normal conversational distance. But the recognition that precise regulation of such conduct is consistent with the First Amendment, does not serve, as the Winter opinion posits, to justify an injunction reaching non-harassing, at-the-site, persuasive appeals that the addressee alter her intended behavior. That is the central teaching of *Thornhill v. Alabama*, 310 U.S. 736 (1940) repeatedly reaffirmed many times since. And, as we now show, properly so.

[12] The injunction at issue in *Madsen* prohibited all communicative approaches to a patient of the clinic unless invited; here, such approaches are permitted, but the intended addressee (or a person in the same group as the addressee) can pretermit all communication *before it begins* by indicating in any fashion a desire not to listen. The net effect is to elevate the desire of the intended audience to avoid *any* communication whatever above the speaker's attempt, however unintrusive, polite, and respectful to begin a dialogue—a result rejected by *Madsen*.

[13] The injunction in this case does reach some of this conduct—crowding, for example, as well as pushing and shoving—but does not attempt to delineate further with specificity the kind of abusive tactics by the "sidewalk counselors" intended to be proscribed.

(A) Almost ten years ago, this Court considered a case arising out of the following incident and the criminal conviction the incident generated:

> [Respondent Raymond Wayne] Hill observed a friend, Charles Hill, intentionally stopping traffic on a busy street, evidently to enable a vehicle to enter traffic. Two Houston police officers, one of whom was named Kelley, approached Charles and began speaking with him. According to the District Court, "shortly thereafter: Hill began shouting at the officers "in an admitted attempt to divert Kelley's attention from Charles Hill." . . . Hill first shouted: "Why don't you pick on somebody your own size?" After Officer Kelley responded: "[A]re you interrupting me in my capacity as a Houston police officer?" Hill then shouted: "Yes, why don't you pick on somebody my size?" [*City of Houston v. Hill*, 482 U.S. 451, 453-54 (1987).]

The testimony showed that Raymond Wayne Hill, the executive director of the Houston Human Rights League, was "prepared to respond in any legal, nonaggressive or nonviolent way, to any illegal police activity", and that

his "motivation was to stop [the officers] from hitting Charles." 482 U.S. at 454 n.1.

Thus, like the antiabortion protestors in this case and the union protestors in *Thornhill*, Mr. Hill, it appears, was communicating with individuals he deeply believed to be engaging in activity both morally wrong and profoundly hurtful of others, in a last ditch effort to convince them not to engage in that activity.

This Court overturned as unconstitutional Hill's conviction under a city ordinance that made it unlawful for an individual to "in any manner oppose, molest, abuse or interrupt any police officer in the execution of his duty." 482 U.S. at 455. The Court stressed that "the First Amendment protects a significant amount of verbal criticism and challenge," including such speech directed to an individual engaged in or about to engage in the disfavored activity. *Id.* at 461-63. That being so, the Housing ordinance "criminalizes a substantial amount of constitutionally protected speech . . . [,] and is facially invalid." *Id.* at 466-67.

Justice Powell's concurring opinion adds that there is sometimes a "fine line" between legitimate criticism of the police and "speech . . . functionally indistinguishable from conduct" such as "persistently attempting to engage the officer in conversation while the officer is directing traffic at a busy intersection" or "run[ning] beside [an officer pursuing a suspected felon] shouting at the officer" and that Hill was on the protected speech side of the line. 482 U.S. at 479 (Powell, J., concurring). And, in response to Justice Powell's point the *Hill* Court noted that his examples "might constitutionally be punished under a properly tailored statute" and emphasized "[w]hat a municipality may not do . . . and what Houston has done in this case, is to attempt to punish such conduct by broadly criminalizing speech . . ." *id.* at 462 n.11. Thus, *Hill* demonstrates both that the kind of harassing tactics the Winter majority focused on here can be prohibited through "properly tailored" provisions and that over-broad provisions prohibiting such conduct *and* trenching on free speech are not consistent with the First Amendment.

While *Hill* differs from this case in many regards—the most obvious being that the speech activity there was directed at government officials, and involved the constitutionality of a criminal ordinance—that case speaks to the issue here in a powerful voice. For *Hill's* reasoning and result demonstrate that the Winter majority's rationale for relegating at-the-site persuasive speech activity on public streets to a First Amendment backwater cannot possibly support that result.

(B) Mr. Hill, labor handbillers promoting a consumer boycott of an unfair employer, animal rights activists seeking such a boycott of a fur store, and anti-war protestors standing in front of a military recruiter's office seeking to dissuade potential enlistees are all on the public streets and are all making use of the streets to engage in direct, in-person persuasion of an individual or individuals who are not out for an aimless stroll but to further some plan of action.

In the *Hill* situation, for example, the policeman is on the scene to monitor the area; in the labor and animal rights situations, potential customers are approaching stores in which they are considering buying something; and in the war protestor situation the potential recruit is considering entry into the military services.

In all these instances, the activists seek to address fellow citizens precisely because of the latters' purpose in being on the public street. And, in all instances, the activists are seeking as their first preference an immediate response by the addressee—not striking a blow in making an arrest, turning away from the abortion clinic, the store or the recruitment office.

At the same time, the activists' appeals can have a communicative impact even where the addressee does not

immediately accept that appeal. Thus, even if the policeman in *Hill* made an arrest using unnecessary force, a policeman so dramatically addressed is more likely to consider the proper means of effectuating his next arrest than one who reads a letter to the editor discussing an improper arrest. Similarly, the pregnant woman, the military recruit or the shopper may go forward with her immediate plan of action, but in so doing and afterwards may nonetheless give thought to the matter of conscience raised by the activist. Indeed, in an era of informational and persuasive overload through a variety of impersonal and commercial media, the long-term impact on listeners of the fact that some of their fellow citizens care enough about a particular moral, political, social or religious issue to take the time and effort personally to communicate their views is likely to have persuasive force of its own.

Nonetheless, according to the Winter majority, such efforts to persuade "targeted audiences"—at a time and place that asks for an imminent response—are at the bottom of the free speech hierarchy and as such are entitled to only the most limited First Amendment protection.

This posit, as we understand it, recognizes that an activist leafletting the general public on a randomly selected downtown street about police abuse or the general evils of abortion or of low wages or of war or of killing animals, or even about the desirability of boycotting abortion clinics, military recruitment offices, or certain stores, comes within the First Amendment's full protection.

The Winter majority's claim rather, is that such protection is lost when that individual seeks to make her appeal more effective by moving to a location, still on a public street, where the audience is composed of individuals whose very presence demonstrates that her message speaks to the addressee's situation.

(C) To take the most settled point in the First Amendment jurisprudence first, proponents of a cause who ad-

dress the general public on random street corners *do* engage in speech activity fully protected by the Constitution. This Court has repeatedly made clear that the First Amendment protects a citizen's right broadly to disseminate ideas to the public at large while present on those open public locations where the public traditionally gathers, including, particularly and preeminently, ordinary public streets.

"Communicating thoughts between citizens, and discussing public questions" is a "use of the streets and public places that has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens." *Hague v. CIO*, 307 U.S. 496, 501 (1939). Thus, "streets, sidewalks, and parks, are considered, without more, to be 'public forums' " (*United States v. Grace*, 461 U.S. 171, 177 (1983)), as to which "the government's ability to permissibly restrict expressive conduct is very limited" (*id.*).

At the same time, the public streets, of course, are used by the citizenry not simply for loitering, for recreation and for social intercourse but as a "necessary conduit in . . . daily affairs." *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 651 (1981). Individuals use the streets as an indispensable means of reaching all manner of destinations vital to their lives—clothing stores, drugstores, food stores, lawyers' offices, doctors' offices, schools, courthouses, government office buildings, convention centers, and so on.

That being so, it would reduce the First Amendment protection to the vanishing point to hold that the citizen right to make use of the ordinary public streets to communicate with other citizens lapses near the entrance to every facility which the addressee has an important reason to enter. In recognition of that consequence the Court has rejected the efforts to so limit free speech on the public streets:

> Traditional public forum property occupies a special position in terms of First Amendment protection

> and will not lose its historical character for the reason that it abuts . . . property that has been dedicated to a use other than as a forum for public expression. [*United States v. Grace, supra,* 461 U.S. at 180.]

It is well-established law, as well, that the right to communicate on the ordinary public streets extends not only to the right to propound abstract ideas or to provide information concerning religious, political, social and moral issues—that war is bad, for example, or that African-American workers suffer employment discrimination, or that cutting trees endangers the spotted owl—but also specifically to exhort the addressees, in the common interest, to advance a cause by putting aside their narrow, individual interests and by altering the behavior their individual interests would dictate. The First Amendment extends

> to more than abstract discussion, unrelated to action. . . . "Free trade in ideas" means free trade in the opportunity to persuade to action, not merely to describe facts. [*Thomas v. Collins,* 323 U.S. 516, 537 (1945).]

That is why Mr. Hill's effort to persuade a policeman to stop an abusive arrest was within the free speech protection. And, similarly, the First Amendment protects the right "through personal solicitation" to request private citizens "to join . . . [in] common cause" by refusing to do something the addressee has every right as an individual to do—for example, shopping at a particular store or joining the army or attending a particular meeting—because such a refusal would be in a larger social interest. *NAACP v. Claiborne Hardware, supra,* 458 U.S. at 909.

In the labor dispute context, for example, this Court more than fifty years ago recognized that the fact that "some of those reached [may] refrain from entering into advantageous relations with the business establishment

which is the scene of the dispute" does *not* deplete the First Amendment protections accorded the speaker seeking that result:

> Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. [*Thornhill v. Alabama, supra,* 310 U.S. at 104] [14]

See also NAACP v. Claiborne Hardware, supra, 458 U.S. at 909 (reaffirming *Thornhill's* protection of speech seeking to induce individuals not to trade with businesses because of the businesses' employment practices).

(D) The question then becomes whether, as the Winter majority posits, the strong protection accorded the free speech right of each citizen to advocate a moral or social cause on the public streets, and to request the addressee to abstain from actions that the latter might otherwise undertake, becomes attenuated when the speaker chooses to present her argument to "specific individuals targeted at locations difficult or inconvenient for them to avoid." 67 F.3d at 396.

As *Hill* shows, this Court's cases answer that question by affirming that the First Amendment protection *does* extend to speakers who are at the site that is at the center of their concern and of their addressees' interest, rather than at remote sites, and who are asking for an immediate rather than a future response. *See Thornhill v. Alabama,*

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[14] Although *Thornhill* is usually referred to as a picketing case, in fact the incident that gave rise to the case involved no patrolling or other conduct now thought to define picketing. Rather, Thornhill approached a worker outside a struck plant and asked him not to work that day. The worker was not threatened, nor was he "in fear." 310 U.S. at 94. And, after hearing Thornhill's exhortation, the worker did decide not to work.

supra, 310 U.S. at 91-92, 105-106 (statute forbidding protestors from going "near . . . the . . . place of business of any person . . . for the purpose of . . . inducing other persons not to trade with . . . such persons" as "limited or restricted in its application to such action as takes place at the scene of the labor dispute" is unconstitutional); *NAACP v. Claiborne Hardware, supra*, 458 U.S. at 903, 909-910. Those precedents could not be more right.

(i) Contrary to the suggestion in the Winter majority opinion, the speaker's free selection of the intended audience *is* an integral part of the freedom of speech. The speaker's "targeting" of her audience is the norm for newspapers, magazines, radio and television stations, charitable solicitors, political candidates and lobbyists. And, speakers select their audiences because speakers are finite beings: It is normally a waste of time and effort to reach an undifferentiated audience with a message meaningless to many of them; it costs more to reach a larger audience; and speech addressed to everybody tends to be so diffuse as to reach nobody.

Mandating that a speaker must address a much broader audience than she wishes to address in order to speak at all is to place a heavy and pointless burden on the right to speak. An order that the Boston Globe, if it is to print at all, must set up distribution systems and ship newspapers to Des Moines, New Orleans, and Seattle as well as to the Boston area, for example, would impose a financial burden on the freedom of speech at least as serious as a tax on newspapers and magazines (*see, e.g., Leathers v. Medlock*, 499 U.S. 439, 447 (1991)), and would interfere with the newspaper's editorial determination—in this instance, to tailor its content to the Greater Boston audience—as least as much as an order to print retractions for misstatements (*see, e.g., Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 255-58 (1974)).

Thus, the First Amendment commitment to speaker autonomy cannot be squared with governmental dictation of the speaker's audience. Rather, given its impact such dictation is a form of direct censorship.

(ii) The Winter opinion is also mistaken in its premise that the First Amendment fully protects only "purely rational" means of persuasion and therefore enables the government to impose a period of repose to assure a fully considered, rather than impetuous, responsive decision. According to that opinion, communications that use "shame", "epithets", "strong language" or breach "rules of etiquette" are not exercises in protected free speech but are "coercive conduct" that is tolerated under limited circumstance to avoid chilling "real" free speech. 67 F.3d at 395-96.[15]

The First Amendment, however, protects the communication of strongly felt emotions meant to induce an immediate commitment in the manner of evangelical preachers, just as the Amendment protects the circulation of well-formed syllogisms appropriate to philosophical reflection—and must do so to serve its free speech purposes.

It is not the case that the First Amendment's *only* office is to foster fully reasoned exchanges that are part of a searching, deliberative decisionmaking process. Rather, the free speech protection advances as well "[t]he individual's interest in self-expression" (*First National Bank v.*

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[15] Throughout its opinion the Winter majority uses the term "coercive conduct" in a manner that clearly applies to words rather than action, and that assumes that the very same words can be "coercive" or not depending upon "the forum and the ability of the audience to avoid the protest at little cost." 67 F.3d at 397. Thus, while one is tempted to agree that the First Amendment does not protect "coercive conduct" because the Amendment does not protect conduct at all, it is plain that the Winter majority uses the term "coercive conduct" to refer to speech deemed to be unprotected because of the *speech's emotional content* and the relationship between the audience and the location at which the speech is uttered, and not to nonexpressive activity.

Bellotti, 435 U.S. 765, 777 n.12 (1978)), recognizing that "[t]he freedom to speak one's mind is . . . an aspect of individual liberty—and thus a good unto itself" (*Bose Corp. v. Consumer's Union*, 466 U.S. 485, 503-04 (1984)).

The Winter majority would denigrate this aspect of the First Amendment's rationale as one that makes "the First Amendment . . . a governmental version of a psychiatrist's couch." 67 F.3d at 395. That bespeaks a small minded view of protecting each citizen's expressional autonomy. As this Court has recognized, the breadth of the First Amendment's protection advances "the common quest for truth and *the vitality of society as a whole*". *Bose Corp., supra*, 466 U.S. at 504 (emphasis supplied):

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion. . . . in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests. [*Cohen v. California*, 403 U.S. 15, 24 (1971).] [16]

Equally to the point, First Amendment jurisprudence recognizes that putting the interest in autonomous self-expression to the side, communication directed at stirring the listener's emotions is not of lesser value than that

[16] *See also Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210 (1975) ("our pluralistic society [is] constantly proliferating new and ingenious forms of expression"); *Winters v. New York*, 333 U.S. 507, 510 (1948) (("We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. . . . What is one man's amusement, teaches another's doctrine.").

directed at stimulating the mind's abstract reasoning processes:

> Much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotion as well. We cannot sanction the view of the Constitution that, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which practically speaking may be the more important element. [*Cohen v. California, supra*, 403 U.S. at 26.]

The " 'emotive impact of speech is not a "secondary effect' " unrelated to the content of the expression itself." *Texas v. Johnson*, 491 U.S. 397, 412 (1989), *quoting Boos v. Barry, supra*, 485 U.S. at 321. Rather, the right to persuade includes the speaker's right, through her choice of words, themes and images, to communicate the fervency of her views as well as their cognitive content, and to appeal to emotions such as shame, sympathy, and desire for social acceptance as a basis for decisionmaking. *NAACP v. Claiborne Hardware, supra*, 458 U.S. at 910-11 (First Amendment protects "persuasion . . . to join the boycott through social pressure and the 'threat' of social ostracism"). [17]

Candidates for public office, for example, do not lose their First Amendment protections in fashioning their campaigns because they seek to enlist voters to their side through the emotive force of their appeals, rather than

[17] Recent research into the anatomy and functioning of the human brain has confirmed the insight in *Cohen* that effective decisionmaking depends at least as much, if not more, on emotional understandings as on abstract reasoning. *See* Antonio R. Damasio, *Emotion, Reason, and the Human Brain* (1994); *see especially id.* at 34-51 (recounting the case of a formerly successful individual who, after suffering brain damage, retained his intellectual mental capacities "[b]ut his ability to make decisions was impaired" because of "a reduction in emotional reactivity and feeling").

through reasoned demonstrations of the superiority of their candidacy or of their public policy positions.

Speech that is "provocative and challenging" is more likely than rote repetition of known truths to "strike at prejudices and preconceptions and have profound unsettling effects as it presses for the acceptance of an idea." *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). Thus, such speech serves to open up the rational faculties so that new ideas can be considered on their merits, rather than rejected out of habit or tradition and is protected by the First Amendment for that very reason. *See Gooding v. Wilson*, 405 U.S. 518, 525 (1972) (distinguishing such speech from "fighting words", which may be proscribed).

(iii) The final premise of the Winter majority's analysis is that at-the-site advocacy of a cause is "inherently coercive" because the audience's presence at the site is dictated by the desire to meet a need and is, thus not "voluntary" (67 F.3d at 396), and because the communication asks the listener for moral, social, or political reasons to suffer the "cost" (*id.*) of foregoing the individual's intended action at that site. In this, the Winter majority is, once again, wrong.

Most people using the public streets are going somewhere for some purpose. Thus, exposure to communicative activity on city streets pleading a moral or social cause is normally both involuntary and inconvenient in the Winter majority's terms. And, this exposure does not differ with regard either to voluntariness or inconvenience when it is in front of a facility the addressee wishes to enter rather than on a street the addressee must traverse to reach that facility; in either case, the addressee can avoid the location, but only at the "cost" the Winters majority posits. 67 F.3d at 396.

Thus, the Winters majority's modest proposal for limiting the scope of free speech by advocates of a cause on the public streets is in fact its death warrant. If this degree of intrusion on the addressee's interests overcomes the free speech right, that right has no substance.

This Court has so recognized and has repeatedly held that the short-term inconvenience or annoyance of limited exposure to an unwanted message for the limited time it takes to pause to consider a speaker's address and then to walk or drive past the speaker if that is the addressee's desire is *not* a basis for ending free speech on the public streets but the inevitable and acceptable cost of free speech. *See, e.g., Coates v. City of Cincinnati*, 402 U.S. 611, 615-16 (1971) ("The First and Fourteenth Amendments do not permit State to make criminal the exercise of the right of assembly simply because its exercise may be annoying to some people"); *Boos v. Barry, supra*, 485 U.S. at 321 (shielding diplomatic personnel from unwelcome speech on public sidewalks abutting the embassy where they work is not a justification consistent with the First Amendment).[18]

While the Winter majority supposed otherwise, the situation here in fact has nothing to do with the so-called "captive audience" situations. The latter class is composed of situations in which an individual in a nonpublic forum is forced to suffer repetitive exposure to speech that may go on for hours or days as part of her daily rounds, not to exposures on public streets that take minutes or seconds from time to time. *See, Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-04 (1974) (distinquishing the "captivity" of a passenger on a bus from street speech encounters); *Madsen*, 114 S. Ct. at 2529 (discussing "captive audience" analysis only with respect to those in the clinic and not with respect to those on the public streets). Individuals not in an enclosed loca-

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[18] Where the message is communicated only through signs or handbills, the addressee will be an unwillingly subject either fleetingly or not at all, since she can refuse to read the handbill or can avert her eyes from the signs. *Erznoznik v. City of Jacksonville, supra*, 422 U.S. at 210.

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tion but on a street can cut off unwanted expression by walking or driving on.

By the same token the Winter majority's attempt to metastasize this Court's cases providing particular protection against unwanted speech within the home into a general protection against all unwelcome expression flies in the face of the very precedents cited. It is difficult to imagine clearer language stating that the cases culminating in *Frisby v. Shultz, supra,* cannot be freely extrapolated from their context than *Frisby's* declaration that "[*T*]*he home is different*. . . . Thus, we have repeatedly held that individuals are not required to welcome unwanted speech *into their own homes* . . ." 487 U.S. at 485; see also *id.* at 484 ("Our prior decisions have often remarked on the *unique* nature of the home . . ."). *Frisby* and its precursors that recognize a heightened privacy interest in the home are thus at the opposite end of the spectrum from cases involving speech on the ordinary public street where privacy interests have the *least* force.

The Winter majority was also of the view that speech activity directed at those approaching a site whose message seeks to dissuade the addressees from carrying through a contemplated course of action there is not free speech but coercive conduct that denies the addressees their freedom. This is what we take to be the point of the court below's insistence that the Constitution "require[s] that individuals who are subject to advocacy be left free to make up their own minds and to adhere to their convictions or intended courses of conduct should they remain unpersuaded." 67 F.3d at 395.

That view supposes that each citizen enjoys a right to act as he desires without being subject to direct communicative efforts to dissuade him from that action. But we know of nothing in this Court's decisions or in the Constitution that creates such a right. And, in the absence of that right, recognizing the legitimacy of at-the-site advocacy does not deny the "targeted audience" any legally cognizable freedom interest.

To be sure individuals who are insulated from those who question the rightness of their actions are more likely to carry through than those who must determine to act after being faced with such a question. That likelihood is not however a basis for silencing the speaker. As the Court made clear in *Organization for a Better Austin v. Keefe, supra,* 402 U.S. at 419-420, publicizing an individual's offensive business practices is not an "invasion of privacy" that can be enjoined consistently with the First Amendment even though "the expressions were intended to exercise a coercive impact on respondent" to sign an agreement to end those practices.

Indeed, the labor dispute example demonstrates the degree to which it would compromise the public dialogue to give credence to the claim that a "targeted audience" is unfairly "coerced" by at-the-site speech that asks the addressee to make an immediate decision on an issue the speaker believes is of moral or social consequence. Labor disputes bring to the surface a profound disagreement as to whether or not the individual's decision—to buy at or work in a struck store, for example—*is* one of purely private concern, or instead *is* one that can entail a breach of a communal responsibility to the public generally (or to a subgroup thereof). For the government to prevent free speech on the ground that the addressee's decision is in truth purely private and that the speakers' moral argument and moral witness are of no consequence because the latter's ultimate position is wrong on its merits would be for the government to take one side of the argument on where autonomy ends and community begins. That, we submit is not the government's role in this free society.

(E) At-the-site persuasive speech activity by its nature involves corporal beings who are the speakers and others who comprise the audience—and not disembodied minds and spirits. To that extent the speech involves an irreducible element of conduct and the conduct involves an irreducible element of direct contact and of cognate effects on

the site's human environment. No matter how peaceful and orderly the speakers are, their very physical presence and their course of speech activity will have radiating effects on the audience. Our showing has been that such speech activity is not taken out of the First Amendment by its persuasive nature, its call for a response or its inherent physical dimension. And, an integral part of that showing has been that such communicative activity is not properly denominated as coercion or some other improper invasion of the "targeted" addressee's legitimate freedom to make his own decisions on his course of action.

CONCLUSION

For the reasons stated above, this Court should reject the analysis proffered by the Winter majority and subject the injunction in this case to the same stringent analysis with respect to the necessity of each speech restriction applied in *Madsen v. Women's Health Center, supra.*

Respectfully submitted,

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